State Sponsors of Terrorism Are Persons Too: The *Flatow* Mistake

KEVIN TODD SHOOK*

In the wake of the terrorist bombing of the USS Cole, the victimized families seek justice and retribution. Just four years ago, Congress may have given them an avenue for relief: an amendment to the Foreign Sovereign Immunities Act (FSIA) permitting United States citizens to bring private suits in federal courts for acts committed outside the United States by nations designated as "state sponsors of terrorism." However, the prospect of haling foreign sovereigns into federal courts for conduct that occurred entirely outside United States borders raises serious Fifth Amendment Due Process concerns given the traditional requirement that defendants have minimum contacts with the forum state. In Flatow v. Islamic Republic of Iran, *the District Court for the District of Columbia found that foreign states are not "persons" for purposes of the Fifth Amendment and are therefore not entitled to the Due Process protection of minimum contacts.*

The author contends that the Flatow *court erred. The proper analysis, according to the author, requires a minimum contacts inquiry that embraces the principles of "national contacts," and asserts general jurisdiction over foreign sovereigns who have "systematic and continuous" contacts with the United States, even though those contacts are unrelated to the claim. Furthermore, the author notes that the reasonableness prong of the traditional minimum contacts test permits courts to give significant weight to our social policies against terrorism. Under this minimum contacts framework, the Amendment remains a powerful tool against state-sponsored terrorism without violating the time-honored principles of the United States Constitution.*

I. INTRODUCTION

On April 9, 1995, a twenty year-old college student from New Jersey named Alisa Flatow boarded a bus that would travel along the Gaza Strip.[1] She was on her spring break from school, trekking across Israel to celebrate the Passover holiday.[2] Tragically, she never made it to her destination. A terrorist suicide

---

* I dedicate this note to my parents, Jim and Diana Shook, who are the greatest teachers in my life. I would also like to thank Charles and Sarah Burk, Steve Shook, and Megan Morris for their loving support.

[1] *Terrorism: Victims' Access to Terrorist Assets: Hearing Before the Senate Comm. on the Judiciary,* 106th Cong. (forthcoming) (Statement of Sen. Orrin Hatch, Chairman, Senate Comm. on the Judiciary); News Release, Senate Comm. on the Judiciary, Statement of Sen. Orrin Hatch Before the Senate Judiciary Committee: "Terrorism: Victims' Access to Terrorist Assets" (Oct. 27, 1999), *available at* http://judiciary.senate.gov/102799oh.htm (on file with the Ohio State Law Journal).

[2] *Id.*

bomber of the Islamic Jihad—a group funded by the Iranian government—rammed a car loaded with explosives into the bus, killing her and seven others.[3]

Prior to 1996, the Foreign Sovereign Immunities Act (hereinafter FSIA) barred lawsuits against foreign state sponsors of terrorism. An American family seeking legal damages against a foreign state faced a litany of difficult options; they could bring a lawsuit in the courts of the foreign state, lobby the United States to exert political pressure for redress, or ask the United States to bring an action before the International Court of Justice.[4] Recognizing the social and political difficulties of these options,[5] Congress passed an amendment (hereinafter 1996 Amendment) to the Foreign Sovereign Immunities Act permitting United States citizens to bring private suits in federal courts for acts

---

[3] *Id.*

[4] Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act,* 87 GEO. L.J. 675, 677 (1999) (listing these three "unhappy" options).

[5] International crimes are largely a product of treaties and conventions that define offenses and establish a legal framework for states to cooperate toward punishment of the perpetrators. John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution,* 12 HARV. HUM. RTS. J. 1, 3 (1999) (providing a brief introduction to international criminal law). Terrorist bombing was defined as an international crime on December 15, 1997, when the United Nations General Assembly adopted an "International Convention for the Suppression of Terrorist Bombings, which will enter into force thirty days after the twenty-second state party has ratified it." *Id.* at 23.

However, nations rarely attempt to use the International Court of Justice or other relevant systems of arbitration to challenge violations of international law. *See id.* at 32–33 (noting that the Genocide Convention has been in force since 1951, but no efforts were taken to induce compliance with it until Bosnia-Herzegovina brought an action in 1993 against Yugoslavia before the International Court of Justice). The jurisdiction of the International Court of Justice over a terrorism dispute is unclear. Glannon & Atik, *supra* note 4, at n.15. Furthermore, it is unlikely that Iran would comply with an order of the International Court of Justice, since the United States ignored an adverse finding of jurisdiction by the International Court of Justice with regard to its military and paramilitary activities against Nicaragua. *Id.* (citing Nicaragua v. United States, 1984 I.C.J. 392 and *U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ,* DEP'T ST. BULL., Mar. 1985, at 64 (statement by the U.S. Department of State, Jan. 18, 1985)).

Similar problems prevent jurisdiction from being established in the international criminal court. This court was created in treaty form on July 17, 1998, by delegates of the United Nations in Rome to prosecute the crimes of "aggression," "genocide," "war crimes," and "crimes against humanity." *See* Murphy, *supra* at 9 (providing analysis of these four "core" crimes, but noting that there may be as many as twenty-four different international crimes). The most debilitating aspect of the Rome statute is that jurisdiction cannot be obtained without the consent of the state where the alleged crime took place or the consent of the state of nationality of the alleged offender. *Id.* at 21 (discussing the limitations of the Rome statute). The requisite state consent presents a seemingly insurmountable barrier where the terrorist act is state sponsored. *See id.* (noting that the practical effect of this limitation is that only those who commit international crimes on foreign soil will be subject to jurisdiction of the international criminal court).

committed outside the United States by nations designated as "state sponsors of terrorism."[6]

Alisa Flatow's father filed a wrongful death action against Iran under these newly enacted provisions and was granted a $247 million judgment.[7] In asserting personal jurisdiction over Iran, the District Court for the District of Columbia held that a foreign state is not a person for purposes of the Fifth Amendment Due Process Clause and any "inquiry into personal jurisdiction over a foreign state need not consider the rubric of 'minimum contacts.'"[8] The court hedged its bets however, and found that even if a foreign state is a person for purposes of the Fifth Amendment, any state sponsor of terrorism has minimum contacts with the United States sufficient for federal courts to assert personal jurisdiction.

This note contends that the *Flatow* court erred in its primary ruling that a foreign state is not a "person" for purposes of the Fifth Amendment, and oversimplified the minimum contacts test it provided in the alternative. Part I will provide a brief background regarding foreign sovereign immunity and personal jurisdiction over foreign states. Part II will review the language of the 1996 Amendment and the subsequent case law leading up to *Flatow*. Part III will analyze the *Flatow* holding and show that the text of the Fifth Amendment, the legislative history of the FSIA and 1996 Amendment, the FSIA case law, and

---

[6] 28 U.S.C. § 1605 (Supp. III 1997).

[7] Stephen Flatow, Alisa's father, has never actually recovered this amount. *See U.S. Quashes Attachment by Terrorism Victim Against Iranian Property*, 16 INT'L ENFORCEMENT L. REP. 561, 562 (2000) [hereinafter *U.S. Quashes Attachment*] (discussing the father's difficulties in attaching Iranian property). The 1996 Amendment permits punitive damage awards and provides victims of state sponsored terrorism with the power to satisfy those judgments through the attachment of foreign state commercial property in the United States. *See* 28 U.S.C. § 1605(a)(7) (1994 & Supp. III 1997). However, none of the plaintiffs filing under the 1996 Amendment have successfully attached the foreign state property and recovered their judgment.

The problem is that the FSIA continues to bar execution on currency reserve accounts on deposit with U.S. financial institutions. Glannon & Atik, *supra* note 4, at 699–703 (discussing enforcement under the 1996 Amendment). Generally, "countries designated as state sponsors of terrorism are unlikely to have substantial assets in the United States." *Id.* at 699. The only alternative to attaching property in the United States, is the highly unlikely prospect of requesting recognition of the judgment in the courts of the foreign state, or by courts in third party states where the state sponsor of terrorism has substantial assets. *Id.* (noting the "dim prospect" of this alternative).

Legislation is currently pending that would amend the FSIA to permit victims of terrorism to collect foreign assets held in the U.S. *See U.S. Quashes Attachment, supra*. Although the bill has bipartisan support, the Clinton Administration is strongly opposed. *See id.* (noting that Administration officials have called the provisions "fundamentally flawed" and "unwise in the extreme"). As a compromise, the White House has offered to pay part of the Flatows' judgment, but Mr. Flatow has refused the offer because it would not achieve the goal of deterring future Iranian sponsored terrorism. *See id.* (explaining that the judgment might be paid out of the Justice Department Victim's Rights Fund).

[8] Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 20 (D.D.C. 1998).

foreign policy all dictate that *Flatow*'s primary holding be overruled. Part IV will review alternative approaches to the application of minimum contacts over foreign state sponsors of terrorism and suggest that general jurisdiction may be established over a foreign state based upon a "national minimum contacts" model that places emphasis upon the furtherance of "fundamental substantive social policies against terrorism."[9]

II. BACKGROUND: FOREIGN SOVEREIGN IMMUNITY AND PERSONAL JURISDICTION

"The United States has long afforded foreign sovereigns immunity from suits in its courts."[10] In 1812, Chief Justice Marshall recognized foreign sovereign immunity as a principle arising from the "common interest impelling [sovereign states] to mutual intercourse, and an interchange of good offices with each other."[11] Until the beginning of the twentieth century, the common law of the United States provided foreign sovereigns with absolute immunity from lawsuits in federal courts.[12] However, with the growth of international trade and shipping, the Supreme Court began to rely on the practices of the State Department rather than principles of international law.[13]

On May 19, 1952, the State Department issued the Tate Letter, announcing that the United States would abandon the theory of absolute immunity, for a restrictive conception of sovereign immunity that provided courts with limited authority to exercise jurisdiction over foreign states.[14] In 1976, Congress essentially codified the Tate Letter in the FSIA, thus transferring immunity decisions from the State Department back to the judiciary.[15] The FSIA preserves foreign state immunity from suit, except for acts falling within one of the statute's express exceptions.

Section 1330(a) provides that "[t]he district courts shall have original jurisdiction . . . as to any claim . . . which the foreign state is not entitled to immunity" under the FSIA.[16] Section 1330(b) states, "Personal jurisdiction over a

---

[9] *See infra* Part V.A (suggesting that this factor might be given extra weight when considering the reasonableness of haling a foreign defendant into court).

[10] Joseph M. Terry, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 66 U. CHI. L. REV. 1029, 1029 (1999).

[11] The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812).

[12] Ethan J. Early, Flatow v. Islamic Republic of Iran *and the Foreign Sovereign Immunities Act: Is Peace of Mind Enough?*, 14 CONN. J. INT'L L. 203, 205 (1999) (providing a brief history of the FSIA).

[13] H.R. REP. NO. 94-1487, at 8–9 (1976) (providing the background of the FSIA).

[14] *See id.* at 8.

[15] The judiciary was thought to be better suited for this task, since it is relatively apolitical. Early, *supra* note 12, at 206.

[16] 28 U.S.C. § 1330(a) (1994).

foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under [1330(a) and] where service has been made under section 1608 . . . ."[17] Standing alone, the statute suggests that personal jurisdiction can be established simply by showing that the defendant falls within one of its express exceptions to sovereign immunity.[18] The statute does not expressly require courts to determine whether an assertion of jurisdiction under the FSIA comports with the Constitution.

However, the Fifth Amendment requirement that no person shall be deprived of life, liberty, or property without due process of law, has traditionally placed additional limits on personal jurisdiction. The Court has said that "due process" requires that a defendant have "minimum contacts" with the territory of the forum before it can be subject to personal jurisdiction.[19] The lower courts, beginning with *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,*[20] have almost unanimously found that a foreign state is a person for purposes of the Fifth Amendment, and is therefore entitled to this due process protection.[21]

The original exceptions under the FSIA are unlikely to conflict with the "minimum contacts" test. This is because most of the exceptions to sovereign immunity require that the acts giving rise to the claim either take place in the United States or have some nexus with the United States.[22] For example, the commercial activities exception to sovereign immunity applies only if the action is based on: (1) commercial activity in the United States, (2) an act performed in

---

[17] 28 U.S.C. § 1330(b) (1994).

[18] Prior to the 1996 Amendment, the FSIA contained the following six exceptions: waiver, cases arising out of commercial activity, rights of property taken in violation of international law, personal injury and death claims arising in the United States, and actions to enforce agreements to arbitrate. 28 U.S.C. § 1605(a) (1994). The 1996 Amendment created a seventh exception for claims against state sponsors of terrorism. *See* 28 U.S.C. § 1605(a) (Supp. III 1997).

[19] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it").

[20] 647 F.2d 300 (2d Cir. 1981). *Texas Trading* was a breach of contract case brought by several American cement companies against the Republic of Nigeria. The Second Circuit found that jurisdiction was proper under the commercial activities exception of the FSIA, but also required "a due process scrutiny of the court's power to exercise its authority over a particular defendant" because the FSIA "cannot create jurisdiction where the Constitution forbids it." *Id.* at 308.

[21] Glannon & Atik, *supra* note 4, at 682 ("Until quite recently, the cases uniformly held that the traditional two-step personal jurisdiction analysis applied to private defendants—requiring that the statute authorize jurisdiction, and that the exercise of that jurisdiction does not offend due process—also applies in actions against sovereign defendants under the FSIA.").

[22] *See* Victoria A. Carter, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction over Foreign States in U.S. Courts,* 82 VA. L. REV. 357, 363 (1996) (arguing that the waiver exception was the only pre-1996 exception under the FSIA which did not require a nexus "between the United States and the acts of the foreign state").

the United States in connection with commercial activity occurring elsewhere, or (3) an act outside the territory of the United States in connection with commercial activity elsewhere that causes a direct effect in the United States.[23] Therefore, actions brought under the commercial activity exception are based on acts occurring in the United States or having a direct effect on the United States.[24]

In contrast, the 1996 Amendment allows federal courts to assert jurisdiction over foreign states providing financial support to organizations that commit terrorist acts completely outside the borders of the United States and not necessarily directed at the United States. Therefore, the long arm reach of the 1996 Amendment may extend farther than the Constitution permits.

III. THE 1996 TERRORISM EXCEPTION

"On May 25, 1995, Judiciary Committee Chairman Henry Hyde introduced the 'Comprehensive Antiterrorism Act of 1995.'"[25] The bill included provisions amending the FSIA to allow lawsuits against foreign state sponsors of terrorism.[26] Similar provisions had been introduced in the two previous Congresses, but the idea had never advanced past the Senate.[27]

The origins of the legislation dated back several years and were tied to several tragic events that shocked the world.[28] Various anti-terrorist proposals gained serious momentum after the tragic bombing of the Oklahoma City Federal

---

[23] *Id.* (citing 28 U.S.C. § 1605(a)(2) (1988)).

[24] The other exceptions to sovereign immunity under the FSIA also require some connection with the United States. For example, the tortious act exception does not apply unless the foreign state defendant committed the tort in the United States. Similarly, the illegal expropriations exception requires that "(1) the expropriated property or money exchanged for the expropriated property be located in the United States in connection with a commercial activity carried on in the United States by the foreign state; or (2) the expropriating foreign state agency be engaged in commercial activity in the United States." *Id.* at 364 (citing 28 U.S.C. § 1605(a)(3)(1988)).

[25] H.R. REP. NO. 104-383, at 37 (1995) (providing the purpose and summary of the Act).

[26] *See id.* at 36 (providing the language of the Act).

[27] *See generally* H.R. REP. NO. 103-702 (1994) and H.R. REP. NO. 102-900 (1992) (House Reports for the proposed "Exception to Foreign Sovereign Immunity for Certain Cases Involving Torture or Extrajudicial Killing in a Foreign State").

[28] Among those events were: (1) the terrorist bombing of Pan Am 103 over Lockerbie, Scotland; (2) the kidnapping and murder of Marine Colonel William Higgins by members of the Hizballah in the Middle East; (3) the bombing of the World Trade Center in New York; and (4) the arrest of Aldrich Ames, a spy whose treasonous acts almost certainly led to countless deaths of government operatives. H.R. REP. NO. 104-383, at 37 (1995).

Building,[29] and the FSIA amendments were eventually enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996.[30]

A. *The Text of the Terrorism Exception*

Under the terms of the exception, sovereign immunity shall not be available in "any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act."[31] The intended effect of the exception was to eliminate the defense of foreign sovereign immunity for claims arising from terrorist or terrorist-sponsored activities.

However, foreign policy concerns raised by the Clinton Administration led to the inclusion of language that places major limits on the jurisdictional reach of the Act.[32] The 1996 Amendment provides that a court should not hear a case if: (1) the foreign state, at the time the terrorist act occurred, is not designated by the Export Administration Act or the Foreign Assistance Act as a terrorist sponsor, (2) the foreign state is a state sponsor of terrorism, but the plaintiff made no attempt to pursue the claim through arbitration, or (3) neither the claimant nor the victim was a national of the United States when the terrorist act occurred.[33]

Foreign states currently designated as sponsors of terrorism include Cuba, Iraq, Iran, Libya, North Korea, Sudan and Syria.[34] Despite these limitations, several actions have been brought pursuant to the 1996 Amendment.

B. *Cases Brought Under the Terrorism Exception*

At this time, seven cases have been brought under the 1996 Amendment, asserting jurisdiction over Cuba,[35] Iran,[36] Iraq,[37] Syria,[38] and Libya.[39] The courts

---

[29] *See id.* ("With the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, on April 19, 1995, the need for this legislation was dramatically and tragically reinforced.").

[30] Pub. L. No. 104-132 § 221 (codified in 28 U.S.C. §§ 1605, 1610 (Supp. III 1997)).

[31] 28 U.S.C. § 1605 (a)(7) (Supp. III 1997).

[32] Leslie McKay, *A New Take on Antiterrorism:* Smith v. Socialist People's Libyan Arab Jamahiriya, 13 AM. U. INT'L L. REV. 439, 456 (1997) (discussing the limitations of the 1996 Amendment).

[33] 28 U.S.C. § 1605(a)(7)(A)–(B)(ii) (1998).

[34] 22 C.F.R. § 126.1(d) (1999) (listing the countries designated as state sponsors of terrorism).

[35] *See* Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1239 (S.D. Fla. 1997) (involving a claim brought against Cuba and the Cuban Air Force for shooting down a United States civilian aircraft carrying United States citizens traveling on a humanitarian mission).

faced with these terrorism claims have approached the question of personal jurisdiction in the following three ways: (1) applying a statutory analysis without any consideration of constitutional limitations, (2) denying Fifth Amendment protection to foreign states and rejecting minimum contacts analysis, and (3) applying a minimum contacts test that places emphasis on "fair notice" or "fair play and substantial justice."

1. *The Statutory Approach: Ignoring Constitutional Limitations*

The first case to apply the 1996 Amendment to the FSIA was *Alejandre v. Republic of Cuba,*[40] where the government of Cuba authorized MiG 29 pilots to shoot down two unarmed civilian planes flying over international waters. The Cuban government did not appear to defend the suit, but sent a diplomatic note that the federal court had no jurisdiction over Cuba or its political subdivisions.[41] Absent an appearance, the court simply asserted jurisdiction over the Cuban government without discussing the possibility that Cuba was entitled to due process rights or whether those rights would be satisfied under minimum contacts analysis.[42]

The United States District Court for the District of Columbia applied a similar approach in *Cicippio v. Islamic Republic of Iran.*[43] In that case, Joseph Cicippio was assaulted and taken prisoner by members of the Hizballah while he

---

[36] *See* Anderson v. The Islamic Republic of Iran, 90 F. Supp. 2d 107 (D.D.C. 2000) (involving Iran's sponsorship of the kidnapping, imprisonment, and torture of Terry Anderson, an American journalist); Flatow v. Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998) (involving Iran's sponsorship of a bombing that took the life of a United States citizen aboard a passenger bus); Cicippio v. Republic of Iran, 18 F. Supp. 2d 62 (D.D.C. 1998) (involving an action brought against Iran for its sponsorship of the assault, torture, and kidnapping of three United States citizens).

[37] *See* Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38 (D.D.C. 2000) (involving claims arising out of three separate but similar incidents in which Iraq allegedly arrested, detained, and tortured the plaintiffs while doing business in Kuwait).

[38] *See In re* Estate of Weinstein, 2000 WL 979060 (N.Y. Sur. June 26, 2000) (involving Syria's alleged sponsorship of a bombing incident that killed a United States citizen in Jerusalem).

[39] *See* Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F. Supp. 325 (E.D.N.Y. 1998) (involving Libya's alleged sponsorship of the bombing of Pan Am Flight 103).

[40] 996 F. Supp. at 1242–47 (stating the facts of the case).

[41] *Id.* at 1242 (discussing the procedural ramifications of Cuba's failure to defend the suit).

[42] *Id.* (stating, without further analysis, that "neither Cuba nor the Cuban Air Force is immune from the suit").

[43] 18 F. Supp. 2d 62 (D.D.C. 1998).

was overseas serving as comptroller of the American University of Beirut.[44] Convinced that Cicippio was a member of the CIA, the captors demanded a confession—beating him and subjecting him to terrifying interrogation and torture on a daily basis.[45]

Cicippio is analogous to *Alejandre* because the defendant failed to make an appearance and the court simply asserted personal jurisdiction pursuant to section 1330(b) without any due process analysis. The court found that section 1330(b) was satisfied because the plaintiff's torture fell within the terrorism exception and service of process was properly delivered.[46]

Two recent cases have also taken this approach. In *Anderson v. The Islamic Republic of Iran,*[47] a case involving the kidnapping, imprisonment, and torture of an American journalist, the District Court for the District of Columbia simply asserted jurisdiction over Iran without any consideration of whether the court had personal jurisdiction.[48] In *In re Estate of Weinstein,* the Surrogate Court of New York, determined that jurisdiction is proper in both state and federal courts, but based this decision entirely on the 1996 Amendment and the intent of Congress not to "limit the purpose of the act" which was to provide "a forum in the United States courts for U.S. citizens who are injured or killed by an act of state sponsored terrorism."[49]

These courts avoided some very difficult questions when they decided to ignore the due process issue. If the courts had engaged in a due process analysis, they would have been forced to determine whether the foreign state's monetary support for terrorist operations in other foreign countries constitutes minimum contacts with the United States.

---

[44] *See id.* at 66. The Hizballah is an Iranian supported terrorist organization dedicated to diminishing American influence in Lebanon. *See id.* at 64.

[45] Cicippio was held prisoner for 1,908 days. He was forced to play "Russian roulette: A revolver was placed to his head with a single bullet in the cylinder. Each denial of a CIA connection produced a pull of the trigger. *See id.* He was also threatened with castration, beaten all over his body, and was confined by chains in a rat and scorpion infested cell." *See id.* at 66.

[46] *See id.* at 67 (explaining that the service of process delivered through the Embassy of Switzerland in Tehran was proper and the acts committed against Cicippio satisfied the following definition of torture:

> [A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain and suffering..., whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual..., or for any reason based on discrimination of any kind.

Id. at n.5.

[47] 90 F. Supp. 2d 107 (D.D.C. 2000).

[48] *See id.* at 113 (applying a statutory analysis, but no constitutional analysis).

[49] *In re* Estate of Weinstein, 2000 WL 979060, at *2 (N.Y. Sur. June 26, 2000).

2. *The* Flatow *Approach: Denying Fifth Amendment Protection*

The question whether a foreign state is entitled to due process protections requiring minimum contacts for personal jurisdiction was directly confronted in *Flatow v. Islamic Republic of Iran,*[50] and resolved in surprising terms. In *Flatow,* the court rejected the *Texas Trading* mantra[51] firmly established in lower court jurisprudence and found that a foreign state is not a person for purposes of the Fifth Amendment Due Process Clause.[52]

The *Flatow* court found authority for its decision in *Republic of Argentina v. Weltover, Inc.,*[53] where the Supreme Court "assum[ed], without deciding" that a foreign state is a person for purposes of the Due Process Clause, but cited the *South Carolina v. Katzenbach,*[54] holding that states of the United States are not "persons" having due process protections.[55] The *Flatow* court argued that the *Weltover* footnote was an invitation to revisit the issue, suggesting that a foreign state might be treated the same way as states of the union.[56]

3. *The Minimum Contacts Approach: Recognizing Fifth Amendment Protection*

The *Flatow* court "hedged [its] bets"[57] on the personal jurisdiction issue, and applied a minimum contacts analysis just in case a foreign state was entitled to Fifth Amendment protection. The court found that a nexus will always exist between the United States and a foreign state brought under the 1996 Amendment, because the language of the Act requires the victim to be a United

---

[50] 999 F. Supp. 1 (D.D.C. 1998).

[51] *See infra* Part IV.C.

[52] *See Flatow,* 999 F. Supp. at 19–21 (holding that a foreign state is not a "person" for the purposes of constitutional due process analysis).

[53] 594 U.S. 607, 619–20 (1992).

[54] 383 U.S. 301, 323–24 (1966). In this case, South Carolina challenged the constitutionality of the Voting Rights Act of 1965, a law suspending the use of literacy voting tests that were effectively preventing black citizens from voting. South Carolina argued that the Act violated due process because it nullified South Carolina's state literacy law without any court ruling that it was unconstitutional. The Supreme Court dismissed the claim because it found that states of the union are not entitled to due process protections because they are not persons for purposes of the Fifth Amendment.

[55] *Weltover,* 504 U.S. at 619. *Weltover* was a breach of contract case brought under the commercial activities exception to the FSIA. In this case, United States bondholders sued when Argentina unilaterally extended the time of payment on its bonds. The Supreme Court applied a minimum contacts analysis before asserting jurisdiction over Argentina "[a]ssuming, without deciding that a foreign state is a 'person' for purposes of the Due Process Clause." *Id.*

[56] *Flatow,* 999 F. Supp. at 21 (stating, "in *Weltover,* the Supreme Court hints that this logic should be extended to interrelationships between states in the international arena").

[57] Glannon & Atik, *supra* note 4, at 689.

States national. Furthermore, the court found that Iran's general diplomatic contacts with the United States were enough to establish minimum contacts with the United States.[58] The court found that "[e]ven in the absence of diplomatic relations, state actors, as a matter of necessity, have substantial sovereign contact with each other."[59] Lastly, the *Flatow* court found that "fair play and substantial justice is well served" by the exercise of jurisdiction over state sponsors of terrorism.[60]

Similarly, in *Rein v. Socialist People's Libyan Arab Jamahiriya,*[61] the Eastern District of New York applied a minimum contacts analysis placing emphasis on whether or not the foreign state had "fair notice." Unlike *Flatow,* the *Rein* court fully recognized a foreign state's right to Fifth Amendment protection under the *Texas Trading* precedent.

The *Rein* case arose from the killing of 270 people who were aboard Pan Am Flight 103—a commercial plane that was bombed while traveling from Frankfurt to London, New York, and Detroit.[62] The court recognized the FSIA provisions establishing personal jurisdiction where subject matter jurisdiction is coupled with proper service, but also required that Libya have minimum contacts with the United States pursuant to due process.[63]

According to the *Rein* holding, the relevant inquiry was "whether the effects of a foreign state's actions upon the United States are sufficient to provide 'fair warning' such that the foreign state may be subject to the jurisdiction of the courts of the United States."[64] The court found that Libya had "fair warning" because the bombing was "expressly aimed at the United States," and "[a]ny foreign state would know that the United States has substantial interests in protecting its flag carriers and its nationals from terrorist activities and should reasonably expect that if these interests were harmed, it would be subject to . . . civil actions in United States courts."[65]

---

[58] *See Flatow,* 999 F. Supp. at 21–22 (stating, "Even if foreign states are invariably 'persons' for the purposes of Constitutional Due Process analysis, Constitutional requirements have been met in this case.").

[59] *Id.* at 23.

[60] *Id.*

[61] 995 F. Supp. 325, 330 (E.D.N.Y. 1998) (applying an abridged minimum contacts test).

[62] *See* Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F. Supp. 306, 309 (E.D.N.Y. 1995). *Rein* was preceded by *Smith,* a case filed under the same facts prior to the 1996 Amendment to the FSIA. The court dismissed the *Smith* action for lack of jurisdiction, finding the facts did not satisfy the exception allowing suits to be filed against foreign states for personal injury occurring in the United States. *See id.* at 313; 28 U.S.C. § 1605(a)(5) (1994). In so holding, the court refused the invitation to consider the Pan Am airplane territory of the United States. *See Smith,* 886 F. Supp. at 313.

[63] *Rein,* 995 F. Supp. at 330.

[64] *Id.*

[65] *Id.*

The District Court of the District of Columbia recently set forth a similar minimum contacts analysis in *Daliberti v. Republic of Iraq*,[66] a case arising out of Iraq's hostage-taking of four Americans who were conducting business in Kuwait.[67] Following *Flatow*, the court noted the serious dangers that such terrorism poses to all mankind, and found that "[i]n such circumstances, 'traditional notions of fair play and substantial justice' are stretched to the limits."[68] The *Daliberti* court reasoned that it was not stretching the traditional minimum contacts analysis too far, because "[a]ll states are on notice that state sponsorship of terrorism is condemned" and the 1996 Amendment "provides an express jurisdictional nexus based upon the victim's United States nationality."[69]

However, unlike *Flatow*, the *Daliberti* court was able to identify specific Iraqi contact with the United States that arose directly out of the claim. The purpose of the Daliberti hostage-taking "was to prompt certain actions by the United States, particularly the lifting of economic sanctions against Iraq and the delivery of millions of dollars worth of humanitarian goods."[70] The court found that the hostage situation had a direct effect on the United States because one of the plaintiffs was not released until "after such goods were delivered from the United States."[71] Thus, the *Daliberti* court was dealing with facts that allowed for a more compelling minimum contacts argument than previous cases. For instance, in *Flatow* there was no evidence that the bus bombing was intentionally directed at United States policy.

Still, the *Daliberti* court was fully aware that it was stretching,[72] and each of these approaches to minimum contacts remain both unorthodox and—as I will argue—a bit incomplete.[73] Nevertheless, any surprises arising from the cases applying minimum contacts analysis under the 1996 Amendment, are dwarfed by the *Flatow* holding that foreign states are not entitled to any Fifth Amendment protection at all. This argument presents a major challenge to the long line of cases affording due process protection to foreign states and places serious foreign policy responsibilities upon the shoulders of the judicial branch.[74]

---

[66] 97 F. Supp. 2d 38 (D.D.C. 2000).

[67] *See id.* at 41 (providing the background and facts of the case).

[68] *Id.* at 54.

[69] *Id.* (quoting *Flatow*, 999 F. Supp. 1, 22–23 (D.D.C. 1998)).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *See infra* Part V.A.

[74] The 1996 Amendment may also present a separation of powers issue for the executive branch. In *Daliberti*, the court rejected the defendant's argument that the provisions requiring the Secretary of State to determine which countries constitute state sponsors of terrorism "impermissibly delegates to an Executive Branch official the power that properly resides in Congress to set the limits of the jurisdiction of the federal courts." *Id.* at 49.

IV. THE *FLATOW* MISTAKE

This note contends that the *Flatow* court erred in holding that a foreign state is not a person entitled to due process protection. The analysis suggests that *Flatow* should be overruled based upon: (1) the text of the Fifth Amendment and the legal meaning of "person," (2) the legislative history of the FSIA and the precursors to the 1996 Amendment, (3) the almost unanimous case law finding that a foreign state is a person for purposes of the Fifth Amendment, and (4) foreign policy considerations.

A. *Textual Considerations: The Fifth Amendment Meaning of "Person"*

The Fifth Amendment provides that "[n]o *person* shall be . . . deprived of life, liberty, or property, without due process of law."[75] At first blush, it would seem that the text of the Constitution lends support to the *Flatow* holding that a foreign state is not a person. After all, in common usage a "person" is a "human being; a man, woman, or child,"[76] and a "state" represents "a politically unified people occupying a definite territory."[77] Thus, it would seem that a foreign state is not really a person, but a collection of persons. However, the term "person" has a much broader meaning in legal usage—both Congress and the Supreme Court have supplied definitions of "person" that include many things beyond the scope of "human being."

1. *Corporations and Governmental Bodies Are Persons*

First of all, the Supreme Court has found that a corporation is a "person" for purposes of the Fourteenth Amendment.[78] Beginning in 1886, the Supreme Court has found that "defendant corporations are persons within the intent . . . of the Fourteenth Amendment" which forbids a state from denying "any

---

[75] U.S. CONST. amend. V (emphasis added).

[76] RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1007 (1991) (stating the definition of "person").

[77] *Id.* at 1305–06 (providing the definition of "state" as referring to a territory).

[78] The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall . . . deprive any *person* of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1 (emphasis added). The Fourteenth Amendment extends the due process limitations placed upon the federal government to state governments. This review of the meaning of "person" examines both the Fifth and the Fourteenth Amendments, given the similar context and meaning of those amendments.

person . . . equal protection of the laws."[79] Similarly, the Court has extended double jeopardy protections of the Fifth Amendment to corporate persons.[80]

Furthermore, the Supreme Court has found that governmental bodies such as states are "persons" for purposes of various federal statutes. In *Chattanooga Foundry & Pipe Works v. Atlanta,*[81] the Supreme Court held that a municipality is a "person" within the meaning of the general definitions section[82] of the Sherman Act.[83] Similarly, the Supreme Court has found that local governments, municipal corporations, and school boards are "persons" subject to liability under the Civil Rights Act, which imposes civil liability on every "person" who deprives another of his federally protected rights.[84] Lastly, in *Georgia v. Evans,*[85] the Court held that the words "any person" in section 7 of the Sherman Act included states of the union. Although the Supreme Court looked beyond the text and also considered the intent and history behind these statutory provisions,[86]

---

[79] Santa Clara County v. S. Pac. R.R., 118 U.S. 394, 396 (1886) (involving claims brought against two railroads for the recovery of taxes due). The Court was unanimous on this issue. At oral argument, Chief Justice Waite said:

> The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.

Id.

[80] *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977) (discussing the double jeopardy protections of the defendant corporation in a criminal contempt action brought to enforce an antitrust consent decree).

[81] 203 U.S. 390 (1906) (involving an action to recover treble damages for injuries sustained by reason of a violation of the antitrust act).

[82] Section 8 of the Sherman Act, 15 U.S.C. § 7 (1976), and section 4 of the Clayton Act, 15 U.S.C. § 12 (1976), are general definitions sections which define "person" or "persons" "wherever used in [this Act] . . . to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

[83] *See* City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 396 (1977) (citing *Chattanooga Foundry,* 203 U.S. at 390).

[84] *See* Monell v. N.Y. City Dep't. of Soc. Servs., 436 U.S. 658 (1978) (finding female employees of the Department of Social Services and the Board of Education of the City of New York were "persons" for purposes of the Civil Rights Act in an action challenging policies requiring pregnant employees to take unpaid leaves of absence before those leaves were required for medical reasons); 42 U.S.C. § 1983 (1994) (the Civil Rights Act).

[85] 316 U.S. 159, 162 (1942) (finding the state of Georgia to be a "person" within the meaning of the Sherman Anti-Trust Act, and therefore able to maintain its action for treble damages for injuries sustained as a result of alleged price fixing and suppression of competition in sale of asphalt which the state purchased for use in constructing public highways).

[86] The Court reasoned that "[n]othing in the [Sherman] Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in § 7 as to exclude a State." *Id.*

these cases clearly demonstrate that the legal meaning of "person" has come to include many entities not included in common usage.

2. *Distinguishing* Katzenbach: *States Are Not Persons*

The Supreme Court's holding in *South Carolina v. Katzenbach*[87] presents the greatest hurdle to the contention that a foreign state is a person for purposes of the Fifth Amendment. In that case, the Court found that "States of the Union" are not "persons" entitled to due process protection.[88] In *Republic of Argentina v. Weltover, Inc.*,[89] the Supreme Court assumed without deciding that a *foreign* state is a "person" for purposes of the Fifth Amendment, but cited *Katzenbach* in a footnote. The *Flatow* court argued that the *Katzenbach* footnote was an "invitation" to revisit the issue, arguing that "[i]f the States of the Union have no due process rights, then a foreign mission . . . surely can have none."[90]

However, the *Katzenbach* decision is clearly distinguishable from the question presented in *Flatow*. First of all, in *Katzenbach,* South Carolina sought to invoke Due Process as a plaintiff seeking to invalidate an act of Congress.[91] The issue in *Flatow* was whether Iran could invoke Due Process as an unwilling defendant. Second, South Carolina did not invoke Due Process by arguing that the claim had no nexus or connection with the United States.[92] Instead, they argued that an Act of Congress aimed at eliminating racial discrimination in voting violated the State's Due Process right to have the question adjudicated in court.

Not only were the facts and issues different in *Katzenbach,* but the Court also rendered its decision with logic that is inapplicable to foreign states. For example, the *Katzenbach* court stated that to its knowledge, no court had ever found the meaning of person under the Fifth Amendment to include states of the union.[93] This is certainly not true in the case of foreign states. The overwhelming and

---

[87] 383 U.S. 301 (1966). *See supra* note 54, for a brief description of the facts in *Katzenbach.*

[88] *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 19–21 (D.D.C. 1998) (arguing that *Weltover*'s citation of the *Katzenbach* footnote was grounds for holding that a foreign state is not a person for purposes of the Due Process Clause).

[89] 504 U.S. 607, 619 (1992). *See supra* note 55, for the facts presented in *Weltover.*

[90] *Flatow,* 999 F. Supp. at 21 (quoting Palestine Info. Office v. Schultz, 674 F. Supp. 910, 919 (D.D.C. 1987)).

[91] Carter, *supra* note 22, at 362 (distinguishing *Katzenbach* from cases involving waiver of foreign sovereign immunity).

[92] *Id.*

[93] *See Katzenbach,* 383 U.S. 301, 323–24 (1966) (stating that "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court").

almost unanimous body of case law in lower courts has established that foreign states are persons for purposes of the Fifth Amendment.[94] Also, *Katzenbach* reasoned that a state could not have standing to invoke constitutional rights, as the parent of its citizens, against the federal government because the federal government is the ultimate *parens patriae* of every American citizen.[95] This, of course, is not true for all foreign states. Unlike the states of the United States, every foreign country is the ultimate parent of its own citizens and should be permitted to invoke constitutional rights on their behalf.

3. *The Fifth Amendment "Person" Includes Foreign Entities*

Significantly, the Supreme Court has already found that due process rights are not necessarily domestic. The "person" referred to in the Due Process Clause includes foreign corporations and individuals that are not American citizens. In *Western and Southern Life Insurance Co. v. State Board of Equalization of California,*[96] the Supreme Court held that the "Equal Protection Clause imposes limits upon a [s]tate's power to condition the right of a foreign corporation to do business within its borders."[97] Furthermore, in *United States v. Pink,*[98] the Supreme Court explicitly found that aliens, as well as citizens, are entitled to the due process protections of the Fifth Amendment. A logical extension of this holding is that foreign states, like foreign corporations, are persons entitled to due process protection.

Thus, the Supreme Court should find that a foreign state is a "person" for purposes of the Fifth Amendment. The Court has already found that various governmental bodies, both foreign and domestic, can fall within the legal meaning of person. The *Katzenbach* holding, that states of the union are not persons, is clearly distinguishable and inapplicable to the question regarding foreign states. For these reasons, Congress has never doubted the applicability of the Fifth Amendment to foreign states.

---

[94] *See infra* Part IV(B).

[95] *Katzenbach,* 383 U.S. at 324.

[96] 451 U.S. 648 (1981) (finding that a state cannot impose more onerous taxes or other burdens on foreign corporations than it imposes on domestic corporations).

[97] Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 875 (1985) (explaining holding in *Western and Southern,* 451 U.S. at 667).

[98] 315 U.S. 203, 226–28 (1942). The *Pink* case involved the disposition of funds of the New York branch of a Russian insurance company, after the Russian Government nationalized the business of insurance and cancelled the rights of shareholders to recover insurance money they were owed. The Supreme Court found that creditors of the Russian company, who were not citizens of the United States, were entitled to Fifth Amendment protection.

A. *Legislative Assumptions: Foreign States Have Due Process Rights*

The legislative history of both the FSIA and the earliest versions of the 1996 Amendment clearly indicate that Congress intended the Fifth Amendment Due Process Clause to apply to foreign states. Committee reports of both acts indicate that it was the purpose of Congress to craft legislation that asserted jurisdiction only over those foreign states that had minimum contacts with the United States.[99]

The House Committee Report for the FSIA provides clear guidance on this issue, stating that section 1330(b) of the FSIA "provides, in effect, a federal long-arm statute over foreign states" patterned after the District of Columbia long-arm statute.[100] The Report states under no uncertain terms that "[t]he requirements of minimum jurisdictional contacts and adequate notice are embodied in [1330(b)]."[101] Clearly, the drafters of the FSIA believed the Fifth Amendment applied to foreign states, and the due process minimum contacts test placed additional limitations on a federal court's power to assert jurisdiction in international litigation.

The 1996 Amendment to the FSIA was part of a much larger terrorism package passed in the wake of the Oklahoma City Bombing.[102] This may explain why the legislative history regarding Fifth Amendment limitations of the 1996

---

[99] This is true, even though the provisions of the FSIA and the 1996 Amendment do not expressly mention Due Process or minimum contacts. The language of section 1330(b) of the FSIA allows federal courts to assert personal jurisdiction over foreign states where there is: (1) subject matter jurisdiction under section 1330(a); and (2) proper service of process pursuant to section 1608 of the Act. 28 U.S.C. §§ 1330(a)–(b), 1608 (Supp. III 1997).

[100] H.R. REP. NO. 94-1487, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612.

[101] *Id.* The reports continues:

> Significantly, each of the immunity provisions in the bill, sections 1605–1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

Id.

The drafters were probably correct in their view that any foreign state that satisfied the elements of the original FSIA exceptions, also satisfied minimum contacts. However, the elements of the 1996 Amendment do not require the same kind of nexus with the United States. *See supra* notes 22–24, and accompanying text.

[102] The Antiterrorism and Effective Death Penalty Act of 1996 also created new terrorist offenses, increased penalties for terrorism-related crimes, devised new investigative tools to uncover terrorism, set prohibitions against expansion of nuclear materials, clarified immigration laws, and funded various anti-terrorism programs, research and development. *See* H.R. REP. NO. 104-518, at 1–4 (1996).

Amendment is virtually nonexistent.[103] Nevertheless, the House Reports of two earlier versions[104] of the 1996 Amendment make it very clear that the amendment would assert personal jurisdiction, "subject to the Due Process Clause's requirement of 'minimum contacts.'"

Thus, the drafters of both the FSIA and the earliest versions of the 1996 Amendment believed that the legislation embraced the principles of minimum contacts. Without a doubt, Congress never intended for the FSIA to permit courts to assert jurisdiction over foreign states that do not have minimum contacts with the United States.

B. *The Case Law Extending Due Process Rights to Foreign States*

"If there is any reason to doubt that foreign sovereigns are protected by the Due Process Clause, it does *not* arise from the case law under the FSIA."[105] To date, the Supreme Court has only "assum[ed], without deciding that a foreign state is a person for purposes of the due process clause."[106] Nevertheless, the lower federal courts have almost unanimously found that a foreign state is entitled to Due Process protections requiring they have minimum contacts.

The principal case discussing personal jurisdiction over a foreign state is *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,*[107] decided just five years after the FSIA was enacted into law.[108] In that case, the Republic of Nigeria, "developing at breakneck speed . . . , contracted to buy huge quantities of

---

[103] *But see* Glannon & Atik, *supra* note 4, at 685–87 (arguing that the absence of any legislative history challenging the constitutionality of the Act suggests that Congress did not believe the assertion of personal jurisdiction over a foreign state involved constitutional considerations). The problem with this view is that the Judiciary Committee addressed constitutional concerns in previous versions of the bill. *See supra* note 101 and accompanying text. Furthermore, the fact that the legislative dogs weren't barking, may only suggest that they were asleep or in a very big hurry to respond to the tragedy in Oklahoma City.

[104] H.R. REP. NO. 102-900, at 1–2 (1992); H.R. REP. NO. 103-702, at 1–2 (1994). The provisions of the earlier exceptions are virtually identical to the 1996 Amendment. However, the 1992 version only asserts jurisdiction over foreign states supporting acts of "torture" and "extrajudicial killing," whereas the 1994 version adds cases of "genocide" and the 1996 Amendment adds cases of "aircraft sabotage" and "hostage taking." Also, the earlier versions are broader because they do not include the requirement that the foreign state be designated as a "state sponsor of terrorism" under the Export Administration Act.

[105] Glannon & Atik, *supra* note 4, at 682.

[106] Republic of Argentina v. Weltover, Inc. 504 U.S. 607, 619 (1992). In a footnote, the Court cited *South Carolina v. Katzenbach,* 383 U.S. 301, 323–24 (1966), which held that states of the union are not persons for purposes of the Fifth Amendment. *Id.* Some have suggested that the footnote casts doubt on a foreign state's right to due process. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 19 (D.D.C. 1998), *and* Glannon & Atik, *supra* note 4.

[107] 647 F.2d 300 (2d Cir. 1981).

[108] *See* Glannon & Atik, *supra* note 4, at 682 (reviewing the case law applying due process analysis to FSIA cases and arguing *Texas Trading* should be abandoned).

Portland cement," but later repudiated those contracts when its docks became so clogged with ships that all exports and imports ground to a halt.[109] The American cement companies sued for breach of contract and the Republic of Nigeria argued that the court lacked personal jurisdiction.[110] The Second Circuit found that the FSIA "cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over a particular defendant."[111]

The *Texas Trading* decision has become the standard authority for the proposition that a foreign state is a person for purposes of the Fifth Amendment.[112] As a result, courts confronted with FSIA cases have routinely cited the *Texas Trading* mantra and applied the traditional minimum contacts test.[113] The *Texas Trading* view has become so ingrained in jurisprudence that it is cited as authoritative in the Restatement of Foreign Relations Law.[114] Clearly, the lower courts have left their mark with consistent opinions of learned judges.

C. *The Foreign Policy Implications of* Flatow

Perhaps the strongest criticism of *Flatow* is not based in legal analysis, but in foreign policy. After all, the United States' interest in foreign relations, treaty obligations, and diplomacy with Iran, must outweigh Flatow's interest in an unsatisfied[115] $250 million judgment.[116] The *Flatow* holding that a state sponsor

---

[109] *Tex. Trading*, 647 F.2d at 302 (2d Cir. 1981).

[110] *Id.*

[111] *Id.* at 308.

[112] *See* Glannon & Atik, *supra* note 4, at 682–84 ("Cases routinely state this proposition as accepted fact with a ritual citation to *Texas Trading*.").

[113] *See, e.g.*, Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1553 (11th Cir. 1993); Gregorian v. Izvestia, 871 F.2d 1515, 1529 (9th Cir. 1989); WMW Mach., Inc. v. Werkzeugmaschinenhandel GmbH IM Aufbau, 960 F. Supp 734, 742 (S.D.N.Y. 1997); Drexel Burnham Lambert Group, Inc. v. Comm. of Receivers for A.W. Galadari, 810 F. Supp. 1375, 1388 (S.D.N.Y. 1993).

[114] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 453 cmt. c (1987).

> The exercise of jurisdiction by courts in the United States is subject to the due process requirements of the Fifth and Fourteenth Amendments. Due process requires that for a state to adjudicate claims against a defendant, the defendant must have at least a minimum of contacts with the state.

Id., quoted in Glannon & Atik, *supra* note 4, at 684.

[115] *See U.S. Quashes Attachment, supra* note 7.

[116] *See* Early, *supra* note 12, at 234–35 (arguing that the balance of interests in the *Flatow* case must be viewed in a practical light, giving substantial consideration to the United States

of terrorism can be haled into an American court—without affording the foreign state the same protections provided to American citizens—could have serious effects on delicate United States diplomatic relationships. The foreign policy issues at stake include the legitimacy of the FSIA, possible retaliation and reciprocation against the U.S. in foreign courts, and unwarranted judicial involvement in foreign affairs.

First of all, the *Flatow* holding threatens the legitimacy of the FSIA. Of the four cases brought under the 1996 Amendment, none of the defendants entered an appearance, and only Libya filed a reply brief.[117] *Flatow*'s refusal to extend due process rights to foreign states only lends support to theories of absolute immunity. Furthermore, *Flatow* only adds fuel to arguments that a foreign state will not get a fair trial in the United States.

These concerns for legitimacy of the FSIA were raised by a representative of the Department of State during committee hearings for the 1996 Amendment. The representative called upon the committee not to "expand our jurisdiction in ways that cause other states to question our statute."[118] The representative further argued that over-expansion of jurisdiction "could undermine the broad participation we seek. It could also diminish our ability to influence other countries to abandon the theory of absolute immunity and adopt the restrictive view of sovereign immunity, which the United States has followed for over forty years."[119]

The concern that disparate treatment between American citizens and foreign states in federal courts might weaken the legitimacy of the FSIA results in a second concern: reciprocal treatment of the United States in foreign courts. The United States commitment to a restrictive theory of immunity means that, in certain situations, it is subject to the jurisdiction of foreign courts. These courts could use *Flatow* to justify different standards for the United States than other

---

interest in diplomacy and the unlikelihood that the Flatow family will ever recover their judgment from Iran).

[117] *See* Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1243 (S.D. Fla. 1997) ("Cuba has presented no defense...."); Cicippio v. Republic of Iran, 18 F. Supp. 2d 62, 64 (D.D.C. 1998) ("Iran was served with process on April 28, 1997, but did not respond to the complaint...."); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 6 (D.D.C. 1998) ("Defendants have not entered an appearance in this matter."); Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F. Supp. 325, 328 n.1 (E.D.N.Y. 1998) (explaining the arguments set forth in Libya's reply brief and noting that "[t]he individual defendants have not been served with the Complaints in these actions and have not entered appearances").

A foreign sovereign's decision not to enter an appearance does not result in an immediate default judgment. The plaintiff must still establish "his claim or right to relief by evidence that is satisfactory to the court." 28 U.S.C. § 1608(e) (1994).

[118] *The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong. 12 (1994) (statement of Jamison S. Borek, Deputy Legal Advisor, Department of State).

[119] *Id.*

defendants who come before it. If the United States wishes to promote the restrictive theory of sovereign immunity and fair and just resolutions of international disputes, then it should lead by example.

Furthermore, the prospect of asserting jurisdiction over a state sponsor of terrorism presents the obvious danger of the judicial branch becoming unnecessarily involved in the United States' most delicate foreign relationships. The Department of State criticism of the 1996 Amendment included particular concern "over the prospect of nuisance or harassment suits brought by political opponents or for publicity purposes, where . . . foreign governments or officials who are not torturers . . . will be required to defend against expensive and drawn-out legal proceedings."[120] The State Department official contended that such suits would create "significant problems for the Executive's management of foreign policy."[121]

Although the Clinton administration's concern that numerous frivolous suits might be filed has not been the reality, it is certainly true that diplomatic negotiations can be undermined when American courts assert jurisdiction over a foreign state for alleged acts of terrorism. For example, a case asserting jurisdiction over Syria might be enough to destroy the United States' central position in Syrian-Israeli peace negotiations.

These difficulties are only heightened when jurisdiction is established over a foreign state for activity so remote that it would not even satisfy the minimum contacts test. On the other hand, if the facts of a case clearly satisfy minimum contacts, then due process protections have cost American plaintiffs nothing and provided an aura of legitimacy and fairness that can reassure the foreign state defendant and its neighbors.

---

[120] *The Torture Victim Protection Act: Hearing on S. 1629 Before the Subcomm. On Immigration and Refugee Affairs of the Senate Comm. On the Judiciary,* 101st Cong. 28 (1990) (statement of David P. Stewart, Assistant Legal Adviser for Human Rights and Refugee Affairs, Department of State).

[121] *Id.* at 20. Stewart concluded:

> This is especially troubling because . . . in order to meet the statutory requirements, plaintiffs will have to allege as a preliminary matter that the conduct in question took place under the authority of the foreign government or under color of its law. In every case, therefore, the "lawfulness" of foreign government policies or sanctions will be an issue. We believe that inquiry by a U.S. court into the legitimacy of foreign government sanctions is likely to be viewed as highly intrusive and offensive.

Id.

V. THE MINIMUM CONTACTS OF STATE SPONSORS OF TERRORISM

Armed with due process rights, a foreign state is only subject to personal jurisdiction where it has minimum contacts with the forum.[122] Applying the minimum contacts analysis does not present an insurmountable barrier to plaintiffs, but simply assures the fairness and legitimacy of the claim. This note advocates a due process framework in which: (1) fundamental social policies against terrorism are given significant weight in examining reasonableness, (2) a national minimum contacts analysis is applied, and (3) jurisdiction can be asserted based on a foreign state's "systematic and continuous" contacts that are unrelated to the claim.

Minimum contacts must be sufficient such that the "maintenance of the suit does not offend traditional notions of fair play and substantial justice."[123] The Supreme Court has clarified that this standard is met only where (1) the defendant has purposefully availed itself of the forum, and (2) it is "reasonable" to exercise jurisdiction.[124] The Court has rejected a "mechanical" approach to personal

---

[122] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Before *International Shoe,* personal jurisdiction could not be established without the defendant's presence in the forum state. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1878) (requiring presence). The *International Shoe* standard allowing courts to assert personal jurisdiction based upon the defendant's contacts with the forum state is critical to the 1996 Amendment since a foreign state could not possibly be present within a United States jurisdiction.

International Shoe involved an action brought by and in the State of Washington for the recovery of unpaid contributions to a state unemployment fund. *See* 326 U.S. at 311. The defendant—a Delaware corporation with its principal place of business in Missouri—manufactured and sold shoes throughout the United States. *Id.* at 313. Although the defendant neither maintained offices nor executed contracts for the sale of shoes in Washington, it did employ eleven to thirteen salesmen who resided and performed their principal activities for the company in Washington. *See id.*

The Court required the defendant have minimum contacts to satisfy the Fourteenth Amendment Due Process Clause, but has subsequently found that Fifth Amendment due process also requires application of the minimum contacts test. *See* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 113 n.* (1987) (implying that the Fifth Amendment imposes a contacts requirement); Tex. Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314–15 (2d Cir. 1981) (applying a minimum contacts analysis pursuant to the Fifth Amendment).

[123] *Int'l Shoe,* 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[124] *See* Burger King v. Rudzewicz, 471 U.S. 462, 474–78 (1985). The Supreme Court found that Florida could exert personal jurisdiction over Michigan owners of a Burger King franchise where their efforts were "purposefully directed" toward Burger King's Miami headquarters and the defendant failed to demonstrate how jurisdiction in that forum was fundamentally unfair. *See id.* at 476.

jurisdiction[125] and applied these rules subjectively, viewing the specific fact patterns of each suit and making case by case determinations.[126]

In determining whether an assertion of jurisdiction is "reasonable," the Court is primarily concerned with the burdens placed upon the defendant.[127] This is especially true in the case of foreign defendants, where "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[128] Nevertheless, the burden on the defendant is considered in light of the state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and interests in furthering fundamental substantive social policies.[129]

There has been considerable disagreement about the kind of contacts a foreign state must have before being haled into a United States court. The Supreme Court's plurality opinion in *Asahi Metal Industry Co. v. Superior Court of California,*[130] coupled with only a cursory minimum contact analysis in

---

[125] *See Int'l Shoe,* 326 U.S. at 319 ("[T]he criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative."). The Court abandoned the traditional black and white standard that required the defendant's presence within the territorial boundaries of the forum state, *see* Pennoyer, 95 U.S. at 722, (holding that jurisdiction is proper where a defendant has minimum contacts with the forum); *see also Int'l Shoe,* 326 U.S. at 316.

[126] The abandonment of this strict rule meant that the court would make specific fact inquiries. *See, e.g., Burger King,* 471 U.S. at 484–85 (considering the business acumen of the defendants and the fact that they did not act under economic duress).

[127] *See* World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292 (1980) ("Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors.").

[128] Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, at 114 (1987). *Asahi* demonstrates the Court's sensitivity to international contacts in cases where the interests of the United States are thin. The United States plaintiff in this case settled its dispute, and the only remaining parties were two foreign defendants. As a result, the interest to the United States was slight and the burden on the defendant was great. *See id.* The court stated:

> [T]he burden on the defendant in this case [was] severe. Asahi [was] commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation's judicial system.

Id.

[129] *See World-Wide Volkswagen,* 444 U.S. at 292.

[130] 480 U.S. 102 (1987). The *Asahi* Court failed to reach a majority on the meaning of purposeful availment. Justices Rehnquist, Powell, O'Connor, and Scalia found that placement of a product in the stream of commerce, without more, is not an act of the defendant purposefully directed at the forum state. *Id.* at 112. Justices Brennan, White, Marshall, and

Republic of Argentina v. Weltover, Inc.,[131] has left federal courts with little guidance on this issue.[132]

The *Flatow* opinion demonstrates this confusion. The court found that even if it were required to perform a minimum contacts analysis, the test would be satisfied for all foreign states sponsoring terrorist activities that cause death or personal injury to United States citizens.[133] The court reached this conclusion based primarily upon consideration of "fair play and substantial justice,"[134] but only briefly mentioned notions of general jurisdiction and national contacts.[135]

Given the Supreme Court's rejection of a "mechanical" test and subsequent case by case approach,[136] it seems unlikely that it would follow *Flatow*'s blanket

---

Blackmun found that a defendant purposefully avails himself where he is aware that his product will reach the forum state through the stream of commerce. *Id.* at 117. Significantly, the Court was almost unanimous (8–1) in holding that assertion of jurisdiction in this case would be unreasonable.

[131] 504 U.S. 607 (1992). Without further analysis, the *Weltover* Court simply stated that "Argentina possessed 'minimum contacts' that would satisfy the constitutional test. By issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that city, Argentina 'purposefully avail[ed] itself of the privilege of conducting activities within the [United States].'" *Id.* at 619–20. The Court did not explain whether the contacts in New York would justify personal jurisdiction of courts outside of New York, or whether it was necessary that Argentina's contacts relate to the claim.

[132] *See generally* Sean K. Hornbeck, Comment, *Transnational Litigation and Personal Jurisdiction Over Foreign Defendants*, 59 ALB. L. REV. 1389 (1996). The author notes that:

> The degree of complexity inherent in jurisdictional analysis has grown so severe that it has become a source of great jocularity. Without a majority opinion, lower courts are left without precedent in determining when jurisdiction based on contacts analysis is consonant with the Constitution of the United States. Currently, foreign defendants continue to argue in favor of *Asahi*'s analysis, while United States plaintiffs continue to offer jurisdictional arguments in accordance with *World-Wide.*

Id. at 1393–94.

[133] *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 23 (D.D.C. 1998) ("As terrorism has achieved the status of almost universal condemnation . . . , this court concludes that fair play and substantial justice is well served by the exercise of jurisdiction over foreign state sponsors of terrorism which cause personal injury or death of United States nationals.").

[134] The *Flatow* court properly placed emphasis on "fair play and substantial justice" based on the Supreme Court opinion that "reasonableness considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Flatow*, 999 F. Supp. at 22 (quoting Burger King v. Rudzewicz, 471 U.S. 462, 483–84 (1985)). However, *Burger King*'s emphasis on reasonableness did not eliminate the requirement of purposeful availment and minimum contacts. Instead, the Court also looked at "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" to determine "whether the defendant purposefully established minimum contacts within the forum." *Burger King*, 471 U.S. at 479.

[135] *See Flatow*, 999 F. Supp. at 22 ("Sovereign contacts, therefore, should be sufficient to sustain general jurisdiction over Defendants . . . .").

[136] *See supra* notes 112–13.

rule that all state sponsors of terrorism will satisfy minimum contacts analysis. Instead, the best approach would take the specific facts of each case and consider not only the reasonableness of jurisdiction, but also consider the nature and quantity of the sovereign's national contacts with an eye toward establishing general jurisdiction in the United States.

A. *Reasonableness and Fundamental Social Policy Against Terrorism*

Applying the reasonableness prong to cases brought under the 1996 Amendment will invariably involve resolution of the conflict between the burden on the defendant on one side and the interests of the plaintiff and the United States on the other.[137] To satisfy "reasonableness," the court will have to find that the plaintiff's interest in relief, coupled with the United States' interest in furthering fundamental social policies against terrorism, outweighs the defendant's burden to litigate in a distant land under foreign law.[138] The inquiry is important because in some cases, a high level of "reasonableness" will diminish the requirement of minimum contacts.[139]

The *Flatow* court correctly noted that due process is not a technical conception, but a flexible framework within which "[e]ach case requires evaluation in light of its own unique facts and circumstances, in order to ensure that the exercise of jurisdiction complies with 'fair play and substantial justice.'"[140] Surprisingly, the court follows this declaration with a blanket rule that "fair play and substantial justice is well served by the exercise of jurisdiction over foreign state sponsors of terrorism which cause personal injury to or death of United States nationals."[141] The *Flatow* court reasoned that all state sponsors of terrorism would satisfy minimum contacts because "[a]ll states are on notice that state sponsorship of terrorism is condemned by the international community," and no foreign sovereign could reasonably believe that "the United States would not respond to [an] attack on its citizens."[142]

While the *Flatow* logic espouses undeniable truths, the analysis seems incomplete, especially given the Supreme Court's strong sensitivity to haling foreign defendants into United States courts.[143] The problem with the analysis is that it lacks any reference to the burden on the defendant, which is normally the primary inquiry of the reasonableness prong.[144] Clearly, in all cases brought

---

137 *See supra* notes 116–18 and accompanying text.

138 *See id.*

139 *See supra* note 122.

140 *Flatow*, 999 F. Supp. at 22.

141 *Id.* at 23.

142 *Id.*

143 *See supra* note 114.

144 *See* World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292 (1980).

under the 1996 Amendment, the burden on the defendant will be great. In each case, the foreign state is burdened by its distance from the United States, the unfamiliarity with United States law, and the FSIA designation that it is a sponsor of terrorism.[145] Thus, a court seeking to establish jurisdiction over a foreign state sponsor of terrorism should set forth a litany of interests that overwhelms the defendant's burden.

In *Rein v. Socialist People's Libyan Arab Jamahiriya,*[146] the Eastern District Court of New York fleshed out some of these interests.[147] The *Rein* court found that the bombing of Flight 103 "had extensive impacts on the United States" including the deaths of "189 United States nationals," the imposition of "significant security concerns for the United States and its aviation industry," and "harm to United States businesses and the domestic economy through . . . a decline in passenger travel and increases in operating, insurance and potential liability costs."[148] The court seemed to imply that these interests outweighed any burden on the foreign state defendant.[149]

The interests of the United States may arise from general substantive social policies against terrorism, but the court must show how the facts place those

---

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

Id. (citations omitted). *See also supra* notes 116–18 and accompanying text.

[145] In *Rein v. Socialist People's Libyan Arab Jamahiriya,* 995 F. Supp. 325 (E.D.N.Y. 1998), Libya argued that the FSIA violates due process because it labels Libya a "state sponsor of terrorism" without a trial. The court found that the state sponsor of terrorism designation did not violate due process because it establishes nothing more than an exception to the FSIA. According to the court:

> The designation in no way affects the merits of the underlying claims or liability of foreign states against whom actions may be maintained. Having determined that it has jurisdiction in this nonjury action, this Court would put the FSIA aside and determine the merits of the action as an entirely separate matter. Furthermore, the FSIA in no way alters the fact that plaintiffs have the burden of proving that Libya was responsible for the acts alleged.

Id. at 330.

[146] 995 F. Supp. 325 (E.D.N.Y. 1998).

[147] This is the only case, other than *Flatow,* where a court performed a minimum contacts analysis pursuant to the 1996 Amendment. *See supra* Part II.B (reviewing the four cases brought under the 1996 Amendment).

[148] *Rein,* 995 F. Supp. at 330.

[149] *See id.* ("Any foreign state would know . . . that if these interests were harmed, it would be subject to a variety of potential responses, including civil actions in United States courts.").

substantive social policies at risk.[150] Arguably, this was a much more difficult task in *Flatow* than it was in *Rein.* The bomb in *Rein* killed 189 United States citizens, on a United States commercial airplane, that was in route to the United States.[151] The bomb in *Flatow* killed one United States citizen, aboard a foreign bus, traveling along the Gaza Strip. The *Rein* bombing provides a stronger case for emphasizing United States interests, because it seems to be more directly targeted at the United States.

Nevertheless, the reasonableness of asserting personal jurisdiction in *Flatow* and cases similar to *Flatow* is not doomed. In reviewing cases brought under the 1996 Amendment, the court should place substantial weight upon the interest in furthering fundamental substantive social policies against terrorism. The plaintiff's argument must be that the United States has an overwhelming social interest in protecting its citizens from terrorist attack wherever they travel, and demonstrate how the facts place that interest at risk. The *Rein* and *Flatow* courts found that this interest alone was enough to satisfy the reasonableness requirement.[152] Once a court establishes the "reasonableness" of jurisdiction, it must then show that the requirement of purposeful minimum contacts is satisfied.[153]

B. *The National Minimum Contacts Test*

Federal courts faced with claims against state sponsors of terrorism must determine the relevant geographical area for purposes of delineating the minimum contacts necessary for personal jurisdiction. In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,*[154] the Second Circuit held that the area with which the defendants must have minimum contacts was the entire United States, not merely the state of New York where the action was pending.[155] However, the *Texas Trading* court found that the Republic of Nigeria had minimum contacts in

---

[150] *See supra* notes 116–18 and accompanying text.

[151] McKay, *supra* note 32 at 440 (reciting the facts and background of the Pan Am 103 tragedy).

[152] *See Rein,* 995 F. Supp. at 330; Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 22–23 (D.D.C. 1998).

[153] *See supra* note 124 and accompanying text (setting forth the two-prong *Burger King* test). The argument that minimum contacts is not necessary where the reasonable requirement has been satisfied, was set forth by a minority of the Court in *Asahi. See* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 121 (1987). Justices Stevens, White and Blackmun did not join Part II-A of the opinion because they believed that the Court's holding that the State's exercise of jurisdiction over petitioner would be unreasonable and unfair alone required reversal, and rendered any examination of minimum contacts unnecessary. *See id.*

[154] 647 F.2d 300 (2d Cir. 1981).

[155] David Todd Pendergast, *Strangers in a Strange Land: Personal Jurisdiction Analysis Under the Foreign Sovereign Immunities Act,* 47 WASH. & LEE L. REV. 1159, 1171 (1990) (discussing the minimum contacts test).

New York through its correspondent bank, and was not faced with a situation where the foreign state contacts were entirely outside of the federal district's jurisdiction.[156]

Nevertheless, many courts have followed the *Texas Trading* "national minimum contacts" model and asserted jurisdiction over foreign defendants where there were no relevant contacts with the forum state. For example, in *Harris Corp. v. National Iranian Radio and Television,*[157] the Eleventh Circuit found Iran's contacts with New York to be sufficient to assert personal jurisdiction in a Florida district court. Similarly, in *Banker's Trust Co. v. Worldwide Transportation Services, Inc.,*[158] the United States District Court for the Eastern District of Arkansas found that a foreign defendant's extensive economic activity in the United States as a whole satisfied the minimum contacts analysis sufficient to subject the defendant to personal jurisdiction in Arkansas.[159]

Many lower courts have justified the national minimum contacts test based on statutes that provide for "nationwide" and "worldwide" service of process.[160] For example, in *Go-Video, Inc. v. Akai Electric Co.,*[161] the Ninth Circuit indicated that national contacts analysis is appropriate when a statute authorizes nationwide service of process.[162] Commentators supporting this view argue that "if Congress can authorize personal jurisdiction over persons anywhere in the United States, it can also authorize personal jurisdiction based on contacts of foreign defendants with the entire United States."[163]

The *Flatow* court briefly referred to national contacts based upon this kind of statutory argument. The court noted that the case was brought against Iran for actions in its sovereign capacity. Because the case was brought in this way, and because "commercial actions under the FSIA embrace the concept of nationwide contacts," the court reasoned that "[s]overeign contacts . . . should be sufficient."[164]

---

[156] *Id.*

[157] 691 F.2d 1344 (11th Cir. 1982). "In *Harris,* an American manufacturer brought suit against Iranian defendants seeking judgement declaring the supply contract between the parties to have been terminated by *force majeure* as a result of the Iranian revolution and the subsequent crisis created when Iranian militants seized hostages at the United States Embassy." Pendergast, *supra* note 155, at 1172.

[158] 537 F. Supp. 1101 (E.D. Ark. 1982).

[159] *See* Pendergast, *supra* note 155, at 1173 (analyzing cases applying a national minimum contacts test).

[160] *See* Hornbeck, *supra* note 132, at 1433–34.

[161] 885 F.2d 1406 (9th Cir. 1989). Go-Video sued several foreign manufacturers for conspiring to prevent the marketing of a dual deck VCR it had patented in the United States. *Id.*

[162] *Id.* at 1414–15.

[163] Hornbeck, *supra* note 132, at 1434 (citing GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 106 (2d ed. 1992)).

[164] Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 22 (D.D.C. 1998).

However, not all courts have followed this broad interpretation.[165] Some commentators criticize this approach because it allows defendants to shop for the forum that is most advantageous to their claim.[166] This criticism is probably not applicable to cases involving terrorism, since the substantive tort laws of different states would likely not vary dramatically enough to alter a finding of tortious terrorist support.

Many plaintiffs with claims against state sponsors of terrorism would benefit from a national minimum contact model. The recent bombing of the USS Cole in Aden, Yemen provides an excellent example. Although the terrorists behind the Yemen massacre currently remain unknown, it is widely accepted that the bombing was targeted against the entire United States. Thus, under a national minimum contacts theory, a family member could bring an action against a state sponsor of terrorism in any federal jurisdiction of the United States based upon the theory that the bombing constitutes contacts with the entire United States. Similarly, under this approach a plaintiff could assert jurisdiction over a foreign state defendant in Kansas, based on the foreign state's contacts with New York City or Washington, D.C. Lastly, the national contacts approach serves as a means of collecting a greater number of contacts, which is essential in establishing the "systematic and continuous contacts" necessary for the assertion of general jurisdiction.

C. *General Jurisdiction: Using Contacts Unrelated to the Claim*

The Supreme Court has recognized two kinds of jurisdiction for foreign defendants: general jurisdiction and specific jurisdiction. Unlike specific jurisdiction, a court may assert general jurisdiction based upon contacts with the forum that are entirely unrelated to the claim.[167] However, the "exercise of general jurisdiction requires a higher minimum contacts threshold than specific

---

165 *See* Meadows v. Dominican Republic, 542 F. Supp. 33, 34 (N.D. Cal. 1982) (declining to exercise jurisdiction over the Dominican Republic because it lacked minimum contacts with the Northern District of California); Olsen by Sheldon v. Gov't of Mexico, 729 F.2d 641, 648–51 (9th Cir. 1984) (requiring minimum contacts with the forum state of California, but not expressly rejecting *Texas Trading*).

166 *See* Pendergast, *supra* note 155, at 1176.

167 *See* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414–15 (1984).

> Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.

Id.

jurisdiction."[168] A federal court may assert general jurisdiction over a defendant only where the contacts with the forum are systematic and continuous.[169]

The Supreme Court has asserted general jurisdiction based on minimum contacts only twice, in *Perkins v. Benguet Consolidated Mining Co.*,[170] and in *Helicopteros Nacionales de Columbia v. Hall*.[171] The Court found general jurisdiction proper in *Perkins*, but not in *Helicopteros*.[172] In both cases, the Court's decision rested upon the nature and extent of the foreign defendant's contacts with the forum.

In determining whether a foreign defendant's contacts are systematic and continuous, federal courts have relied upon the following four factors:

> (1) the extent to which the defendant availed themselves of the privileges of American law, (2) the extent to which litigation in the United States would be foreseeable to them, (3) the inconvenience to defendants in litigating in the United States, and (4) the countervailing interest of the United States in hearing the suit.[173]

These factors bear considerable resemblance to those applied in the reasonableness prong. Thus, where the interest of the United States is great, and the foreign state has availed itself to the extent that litigation in the United States is foreseeable, the contacts with the United States need not relate to the claim.

The principle of general jurisdiction is important to the 1996 Amendment. For example, the *Flatow* case involved the bombing of a passenger bus that was traveling along the Gaza Strip.[174] Although the incident resulted in the death of a

---

[168] Bret A. Sumner, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 46 CATH. U. L. REV. 907, 939 (1997).

[169] *Helicopteros*, 466 U.S. at 414–15.

[170] 342 U.S. 437 (1952). The *Perkins* Court found that Ohio could properly assert general jurisdiction over a Philippine mining corporation, based upon its unrelated but systematic and continuous contacts with Ohio. The corporation's contacts with Ohio were the result of Japanese occupation of the Philippines, which halted all mining operations, and forced the president to return to his Ohio home. In Ohio, the president maintained an office from which he carried on personal and corporate business, did banking for the corporation, and supervised policies dealing with the rehabilitation of properties and dispatched funds. *Id.* at 447–48.

[171] 466 U.S. 408 (1984). The case involved a wrongful death action brought in Texas state court against a Colombian corporation. *Id.* at 416–17.

[172] In *Helicopteros*, the Colombian corporation's contacts with Texas consisted of a few trips to Texas by corporate employees, and one trip by the corporation's chief executive officer for the purpose of negotiating a contract, drawing checks from a Texas bank, and purchasing helicopters. The Court found that these contacts were not systematic and continuous. *Id.* at 418.

[173] Sumner, *supra* note 168, at 940 n.128 (citing Tex. Trading & Milling Corp. v. Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1987)), and Debra Windsor, Comment, *How Specific Can We Make General Jurisdiction: The Search for a Refined Set of Standards*, 44 BAYLOR L. REV. 593, 606–13 (1992) (examining federal court tests for general jurisdiction).

[174] Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7 (D.D.C. 1998).

United States citizen, it did not result in any direct contact with the United States. Many cases arising under the 1996 Amendment will face the same problem.[175] However, under the principle of general jurisdiction, the court could have haled Iran into federal court if it found that Iran had systematic and continuous diplomatic, economic, or political contacts with the United States such that litigation in the United States was foreseeable.

Federal courts seeking to assert general jurisdiction in cases brought under the 1996 Amendment face a difficult task because a sovereign designated as a "state sponsor of terrorism" is often subject to economic sanctions and cold diplomatic relations which result in very few international contacts.[176] Nevertheless, the *Flatow* opinion found that sovereign contacts were "sufficient to sustain general jurisdiction over Defendants."[177] The court also found that "[e]ven in the absence of diplomatic relations, state actors, as a matter of necessity, have substantial sovereign contact with each other."[178] There is substantial evidence to support this argument. Not only do Iran and the United States remain in constant contact through media and intelligence, but there have been some direct communications.[179]

Thus, many claims brought under the 1996 Amendment will require a finding of general jurisdiction. The proper analysis—rendering a finding of general jurisdiction more likely—will review the reasonableness of jurisdiction with emphasis on fundamental social policies against terrorism and the extent of the foreign state contacts on a national scale. Through this due process framework, the legitimacy of the 1996 Amendment is preserved without undermining the protections Congress intended to provide to United States citizens.

---

[175] *But see* Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 54 (D.D.C. 2000) (holding the defendant's terrorist acts had a direct effect on the United States because it caused the United States to deliver millions of dollars in humanitarian goods in return for hostages).

[176] *See id.* at 53–54. United States companies would like to pump oil in Iran again, but United States economic sanctions against Iran prevent this from happening. Similarly, Iranians yearn for business with the world's biggest economy, but continue to harbor anti-American sentiments. Larry Kaplow, *Iran Hostage Crisis Remembered: Countries Still Worlds Apart,* ATLANTA J. & ATLANTA CONST., Oct. 31, 1999, at G2. Even reformist President Mohammad Khatami, who has left the door open to better ties with Washington, recently said the United States is "unjust" and remains separated from Iran by a "wall of mistrust." Kianouche Dorranie, *Iran for Detente but U.S., Israel Still Excluded,* AGENCE FR.-PRESSE, Aug. 18, 1999, *available at* LEXIS, News Library.

[177] *Flatow,* 999 F. Supp. at 22.

[178] *Id.* at 23.

[179] President Clinton recently sent a letter to Iranian President Mohammad Khatami asking cooperation in investigating the 1996 bombing of a U.S. military housing complex in Saudi Arabia. *U.S. Asked Iran to Help Find Bombers,* CHI. TRIB., Sept. 30, 1999 at 18.

VI. CONCLUSION

The bomb that killed Alisa Flatow provokes anger within even the most dovish American. Nevertheless, we should not let that bomb fall upon the Constitution and its time honored principles. Congress created the 1996 Amendment to provide relief for the families of victims of terrorism. That noble goal can be achieved without the *Flatow* result—foreign states should not be stripped of due process rights.

The Supreme Court has found that the legal meaning of "person" can include entities beyond human beings.[180] The drafters of the FSIA and the earliest versions of the 1996 Amendment, clearly believed that foreign states are "persons" protected by due process requirements of minimum contacts.[181] Congress's assumptions are understandable given the long line of case law that almost unanimously supports the principle that foreign states are persons for purposes of the Fifth Amendment.[182]

The *Flatow* ruling is also problematic from a foreign policy standpoint.[183] If foreign states are not entitled to due process rights, it might be easier for politically motivated citizens to file harassment suits against a sovereign. Furthermore, stripping foreign states of rights afforded to American citizens discourages foreign participation in our judicial system and may incite reciprocal treatment of the United States in foreign courts. All of these concerns can make executive management of foreign diplomatic relations and negotiations very difficult.

Protecting foreign states with due process requirements of minimum contacts does not spell the demise of the 1996 Amendment. Courts should review the national contacts of each foreign state on a case by case basis, asserting general jurisdiction where it can be found that national contacts are systematic and continuous.[184] As always, the burden of the foreign defendant should be given great weight, but this burden can be counterbalanced based on fundamental substantive social policies against terrorism.[185] Under this approach, the strength of the Flatow claim is not weakened. Indeed, the legitimacy of the 1996 Amendment and the FSIA depends upon fair application of Constitutional principles.

---

[180] *See supra* Part IV.A.

[181] *See supra* Part IV.B.

[182] *See supra* Part IV.C.

[183] *See supra* Part IV.D.

[184] *See supra* Part V.B–C.

[185] *See supra* Part V.A.